

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 TRESHA ERVIN,

10 Plaintiff,

11 v.

12 SGT. JIM KELLY, et al.,

13 Defendants.

CASE NO. C10-5145BHS

ORDER GRANTING  
DEFENDANTS'  
MOTION TO DISMISS

14  
15 This matter comes before the Court on Defendants' 12(b)(1) and 12(b)(6) Motion  
16 to Dismiss (Dkt. 13). The Court has considered the pleadings filed in support of and in  
17 opposition to the motion and the remainder of the file and grants Defendants' motion to  
18 dismiss for the reasons stated herein.

19 **I. FACTUAL AND PROCEDURAL BACKGROUND**

20 On July 21, 2009, Plaintiff Tresha Ervin ("Ervin") filed a complaint in *Tresha*  
21 *Coleman v. City of University Place, et al.*, C09-5444BHS, against City of University  
22 Place, Pierce County, Tacoma Unified School District, Dan Besett, Lillian Ebersole,  
23 Cherry Goudeau, and unknown University Place Police Officers. *See* Dkt. 13 at 10-21.  
24 On March 4, 2010, Ervin filed the complaint in the above-captioned action against  
25 Defendants University Place Police Officers: Sargent Jim Kelly, Denis Banach, Brian  
26 Thompson, Dan Hacker, Dennis Robinson, and Doug Shook. Dkt. 1 at 2-3. Both  
27 complaints arise out of an alleged unlawful entry into Ervin's home on March 15, 2007  
28

1 and allege violations of 42 U.S.C. § 1983, invasion of privacy, and false imprisonment.  
2 Dkt. 1; *see* Dkt. 13 at 10-21. This action was originally before U.S. District Judge Robert  
3 J. Bryan but was transferred to the undersigned on June 23, 2010. Dkt. 24.

4 On May 27, 2010, Defendants filed a motion to dismiss the complaint in this  
5 action on the grounds that it is a successive/duplicative suit, Ervin has engaged in  
6 impermissible claim splitting, and because Ervin has failed to comply with the  
7 Washington claim-filing statute with respect to her state law claims. Dkt. 13. On June  
8 14, 2010, Ervin responded stating that Defendants' motion should be denied and the cases  
9 consolidated as she filed the second suit to avoid statute of limitations issues due to  
10 difficulty in obtaining the names of the police officers that allegedly entered Ervin's  
11 home in March of 2007. Dkt. 16. On June 18, 2010, Defendants replied stating that a  
12 consolidation would not solve the issues brought up in their motion to dismiss and again  
13 requested that the Court dismiss the suit under Rules 12(b)(1) and 12(b)(6) of the Federal  
14 Rules of Civil Procedure.

## 15 II. DISCUSSION

16 Defendants argue that Ervin should not be allowed to circumvent the amended  
17 pleading rules and statute of limitations issues by filing a second suit. *See generally* Dkt.  
18 20. Specifically, Defendants assert that this action should be dismissed under the first-to-  
19 file rule for lack of jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil  
20 Procedure. Dkt. 20 at 2-5. Having considered the two actions, the Court finds that all  
21 three factors of the first-to-file rule weigh in favor of dismissing this action. *See*  
22 *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982) (applying the  
23 first-to-file rule). In *Pacesetter*, the Ninth Circuit stated that courts applying the first-to-  
24 file rule should consider the following factors: (1) the chronology of the actions, (2) the  
25 similarity of the parties, and (3) the similarity of the issues. *Id.* Here, Ervin's complaint  
26 in C09-5444 was filed approximately eight months before the current action, the parties  
27 are identical with the exception that the police officers are named in the current action,  
28

1 and the questions of law and fact are identical in the two suits. Thus, the Court  
2 concludes that this action is dismissed under Rule 12(b)(1) as the Court lacks jurisdiction  
3 over this successive suit.

4 In her original complaint filed in C09-5444, Ervin named as parties “unknown  
5 University Place Police Officers” and then named those individual officers in the instant  
6 action before the statute of limitations apparently expired on March 15, 2010. Dkt. 16;  
7 *see* Dkt. 1. Although the Court issued a deadline of June 2, 2010, for seeking leave to  
8 amend pleadings in C09-5444, the Court will allow Ervin to file a motion for leave to  
9 amend her complaint in that action on or before August, 3, 2010.

### 10 **III. ORDER**

11 Therefore, it is hereby **ORDERED** that Defendants’ motion to dismiss this action  
12 (Dkt. 13) is **GRANTED**.

13 DATED this 23rd day of July, 2010.

14  
15 

16 BENJAMIN H. SETTLE  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28